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Supreme Court of the United States

ALASKA AIRLINES, INC., PETITIONER,

v.

AZZA EID, AMRE R. GINENA, NAHID I. GINENA, REDA A. GINENA, SABRINA KOBERT, M. SAMIR MANSOUR, NAZMI N. NAZMI, M. MAGDY H. RASIKH, AND HEBA NAZMI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case involves the proper interpretation of a multinational treaty. Yet a majority of a Ninth Circuit panel read the Tokyo Convention contrary to the views of the Executive Branch of the United States, which were set forth in an amicus brief submitted to the panel at the court's invitation. Respondents make no effort to reconcile the Ninth Circuit's holding with the views of the United States. Instead, they simply adopt the panel majority's approach of refusing to acknowledge or address those views.

Respondents defend the Ninth Circuit's interpretation of the Tokyo Convention as giving no deference to the aircraft captain in determining whether the captain had "reasonable grounds to believe" that action was warranted in response to passenger conduct that may jeopardize the safety of the aircraft or of persons or property therein or good order and discipline on board. That interpretation is contrary to the purpose and structure of the Convention and, unless reviewed, will require immediate changes to training procedures and may deter needed actions during flight.

Respondents also offer (Br. in Opp. 4-7, 17-18) numerous alleged facts as to what supposedly occurred in the aircraft's first-class cabin and as to the purported subjective motivations of the flight attendants. But those facts are irrelevant to the issue here because they do not address what the aircraft Captain knew when he made his decisions. Indeed, the

core facts are undisputed by respondents. While in flight, the Captain received a call from a flight attendant in which she emotionally told him that she had "lost control" of the first-class cabin. Br. in Opp. 5. The Captain did not delay to question his crew member or attempt an in-flight investigation. Br. in Opp. 5-6. Instead, relying on that report, the Captain diverted the aircraft to the nearest airport. Br. in Opp. 6. After he landed the aircraft, the Captain spoke with the flight attendant. Br. in Opp. 6. Based on what she told him, the Captain asked law enforcement to remove the passengers identified by the flight attendant as causing a disturbance and arrest them. Br. in Opp. 6-7.

The panel majority held that every aspect of the Captain's conduct—from the decision to divert and land the aircraft, to the removal of the passengers and their delivery to law enforcement—was subject to a non-deferential jury determination as to whether he had "reasonable grounds to believe" the actions were warranted. Pet. App. 29a. That erroneous ruling warrants this Court's immediate review.

A. Respondents Offer No Defense Of The Ninth Circuit's Disregard Of The Views Of The Executive Branch

Respondents do not dispute that the views of the Executive Branch regarding the meaning of a treaty are entitled to "great weight." Pet. 24 (quoting *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010)). But the Ninth Circuit gave no weight, and indeed refused

to even acknowledge, the view of the Tokyo Convention offered by the United States, as reflected in its amicus brief below. Pet. App. 124a-133a.

The United States urged the Ninth Circuit to adopt a highly deferential standard in determining whether an aircraft captain had "reasonable grounds to believe" action was warranted. Pet. 24-25. The United States also urged that the aircraft captain should not ever have to personally engage in an investigation and that the captain could always rely on reports from the crew. Pet. 25-26. And the United States warned that non-deferential review would undermine the purpose of the Tokyo Convention—to encourage aircraft captains to take decisive action. Pet. 26.

Respondents do not dispute that the Ninth Circuit rejected each of those views. Instead, like the Ninth Circuit, respondents simply ignore that amicus brief. But a conflict between the views of the United States and a court regarding the meaning of a treaty is precisely the type of circumstance that warrants review by this Court. *See Kolovrat v. Oregon*, 366 U.S. 187, 190-191 (1961) (granting certiorari to review lower court's interpretation of a treaty that was contrary to views of the United States as amicus). Ignoring the conflict does not make it go away.

B. Respondents Repeat The Ninth Circuit's Error Of Misreading The Text Of The Tokyo Convention In A Manner Contrary To Its Purpose

1. Respondents assert (Br. in Opp. 2, 14, 15, 23, 29) that the phrase "reasonable grounds to believe" has a "straightforward," "clear," "usual," and "accepted" meaning. They do not describe what that meaning is, however. Instead, they simply assert that the Ninth Circuit is correct in concluding that these words cannot be read to include any deference to the aircraft captain. Br. in Opp. 15, 22. In doing so, respondents contradict their own claim that the decision is simply a fact-specific ruling. Br. in Opp. 16, 19.

Respondents further claim (Br. in Opp. 16, 18) that the Ninth Circuit's opinion does not require an aircraft captain to investigate in order for his beliefs to be based on "reasonable grounds." But the panel majority held that summary judgment was not appropriate because a jury could find that the Captain "should have tried to find out *something* about what was going on in the cabin." Pet. App. 22a.

2. Respondents also claim (Br. in Opp. 15) that there is no provision in the Tokyo Convention that could embody a concept of deference. Terms like "reasonable" or "reasonable grounds," however, have no single meaning. *See Francis S. v. Stone*, 221 F.3d 100, 109 n.12 (2d Cir. 2000) ("we are familiar with [the] many meanings [of the word 'reasonable'] in the

different contexts in which the word (or its antonym) is used"). Instead, their meaning is dictated in large part by context. *See, e.g., Draper v. United States*, 358 U.S. 307, 311 n.3 (1959) ("reasonable grounds" and "probable cause" "are substantial equivalents of the same meaning" under criminal statute); *Public Serv. Comm'n of Puerto Rico v. Havemeyer*, 296 U.S. 506, 518 (1936) ("'Reasonable,' as here employed, means not 'capricious,' 'arbitrary,' or 'confiscatory.'"); *see also United States v. $121,100.00 in U.S. Currency*, 999 F.2d 1503, 1506 (11th Cir. 1993) ("A 'reasonable ground for belief' [in a forfeiture proceeding] is less than *prima facie* proof but more than mere suspicion."); *United States v. Coleman*, 22 F.3d 126, 130 (7th Cir. 1994) ("'Reasonable grounds' denotes a degree of certainty less than that of probable cause and is informed by a host of factors * * * ." (citation and footnote omitted)).

3. The context in which the "reasonable grounds to believe" language was adopted demonstrates that it was not intended to be a negligence-like standard without any deference to the aircraft captain.

First, the purpose of the Tokyo Convention was to encourage aircraft captains (and other crew members and passengers acting under the captain's direction) to take decisive action. The defense created under the Tokyo Convention to liability was intended to "enhance" the "proper attitudes and actions" in response to signs of trouble. Pet. 17 (quoting S. Rep. No. 91-1083, at 2 (1970)). The breadth of language used in the Convention in defining the type of misconduct to

which the aircraft captain may respond also demonstrates the substantial discretion the Convention intended the aircraft captain to possess. Pet. 20-21; Br. of Amici Air Transport Ass'n of America, Inc. & International Air Transport Ass'n, at 19. By contrast, the Ninth Circuit's standard could make aircraft captains reluctant to make prompt decisions for fear of future litigation. *See* Br. of Amici Air Line Pilots Ass'n, Int'l & International Federation of Air Line Pilots Ass'n, at 8; Br. of Amici Air Transport Ass'n of America, Inc. & International Air Transport Ass'n, at 4; Br. of Amici Professors Paul Dempsey & Pablo Mendes de Leon, at 2, 8. *Compare Minot v. Canada* [2011] 2011 CarswellNfld 9, 2011 N.L.C.A. 7, ¶ 58 (Can.) (upholding criminal conviction on the ground that "[a]n in-flight aircraft is in a vulnerable state and chances cannot be taken with the lives of passengers and crew, the aircraft itself or property and persons on the ground. * * * With the benefit of hindsight, we know that the devices [the passenger] operated * * * did not constitute a threat to the aircraft. However, this new information does not now allow [the passenger] to answer the charge by second guessing the exercise of professional judgment to divert the aircraft.").

Second, unless the Tokyo Convention is read as granting deference to the aircraft captain, the Convention's protections would be superfluous in civil litigation given the already in-effect Warsaw Convention. Under the Warsaw Convention, airlines are presumptively liable for bodily injury or death of a

passenger unless the airline can establish lack-of-negligence as a defense. Pet. 20 (citing *Olympic Airways v. Husain*, 540 U.S. 644, 649 n.5 (2004)). If the Tokyo Convention's "reasonable grounds to believe" language were treated as essentially a negligence standard, as the panel majority did below, then it would provide no additional protection to airlines and their employees. Respondents insist (Br. in Opp. 19-20) that the Tokyo Convention provides a separate defense, but offers no example of a situation in which it would provide more protection than the Warsaw Convention already offered.

Third, the Tokyo Convention's drafters understood the Convention to confer broad authority on the aircraft captain. Pet. 22-23; Br. of Amici Air Transport Ass'n of America, Inc. & International Air Transport Ass'n, at 11-16; Br. of Amici Professors Paul Dempsey & Pablo Mendes de Leon, at 9-10. Indeed, as the dissenting judge below noted, the United States' delegate actually used the words "arbitrarily or capriciously" in describing the limits of the captain's authority. Pet. App. 51a. Neither the panel majority nor respondents address that fact in discussing the drafting history. Pet. App. 15a-16a; Br. in Opp. 25-28. Both simply omit that sentence from their block quotes. *Compare* Pet. App. 50a *with* Pet. App. 16a *and* Br. in Opp. 26. Regardless of the precise nomenclature that may be appropriate in describing the level of deference, it is plain that the drafters intended aircraft captains to receive some deference. Yet the Ninth Circuit majority refused to award them any.

C. This Case Conflicts With Decisions From Other Courts And Will Cause Substantial Confusion For Aircraft Captains

The Ninth Circuit standard applied to international flights in this case conflicts with the standard applied to domestic flights under federal law in the First and Second Circuits (as well as in a host of district courts), which articulate a deferential standard of review. Pet. 28-31 (citing, inter alia, *Cerquiera v. American Airlines, Inc.*, 520 F.3d 1, 12 (1st Cir.), cert. denied, 129 S. Ct. 111 (2008), and *Williams v. Trans World Airlines*, 509 F.2d 942, 946 (2d Cir. 1975)). The panel majority expressly declined to follow the reasoning of those decisions. Pet. App. 19a. That refutes respondents' assertion that the decision creates no conflict.

These conflicting standards will cause substantial confusion for aircraft captains. Br. of Amici Professors Paul Dempsey & Pablo Mendes de Leon, at 20. That is because, contrary to respondents' claim (Br. in Opp. 30), it simply is not realistic for aircraft captains to apply a different standard to international than to domestic flights. *See* Br. of Amici Air Line Pilots Ass'n, Int'l & International Federation of Air Line Pilots Ass'n, at 10-11; Br. of Amici Air Transport Ass'n of America, Inc. & International Air Transport Ass'n, at 3, 24. Delay in addressing this issue will make the Ninth Circuit panel majority's standard the *de facto* national and international standard. *See ibid.*

D. This Case Is An Appropriate Vehicle To Review An Erroneous Legal Ruling That Has Significant Immediate Negative Effects On The Airline Industry

Respondents note (Br. in Opp. 1, 3, 31-33) that the Ninth Circuit's opinion is interlocutory and that petitioners might be able to prevail at trial even under the panel majority's holding. The panel majority, however, has articulated an incorrect legal rule that will substantially affect the claims (if any) that will proceed to trial and the instructions given to the factfinder. This Court frequently grants certiorari to resolve important threshold questions when, as here, a federal court of appeals has reversed the grant of a motion for dismissal or summary judgment and remanded the case for further proceedings. *See, e.g.*, *Astra USA, Inc. v. Santa Clara Cnty.*, No. 09-1273, ___ U.S. ___, 2011 WL 1119021 (U.S. Mar. 29, 2011); *Matrixx Initiatives, Inc. v. Siracusano*, No. 09-1156, ___ U.S. ___, 2011 WL 977060 (U.S. Mar. 22, 2011); *Hemi Grp., LLC v. City of New York, N.Y.*, 130 S. Ct. 983 (2010).

Furthermore, as amici demonstrate, the Ninth Circuit's opinion will immediately influence training and standard-operating procedures for aircraft captains and crews. *See* Br. of Amici Air Line Pilots Ass'n, Int'l & International Federation of Air Line Pilots Ass'n, at 10-11; Br. of Amici Air Transport Ass'n of America, Inc. & International Air Transport Ass'n, at 24. This Court's immediate review is thus appropriate because the Ninth Circuit resolved an

"important" issue of law "that is fundamental to the further conduct of the case" and "will have immediate consequences for the petitioner." Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (citing cases).

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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